SUPPLEMENTAL APPENDIX

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Application of	)	
CONTINENTAL BROADCAST-	)	Docket No. 16050
ING, INC., NEWARK, N.J.	)	File No. BR-174
For Renewal of License of Sta-	)	
tion WNJR, Newark, N.J.	)	

APPEARANCES

Paul Dobin and *Martin J. Gaynes, Esqs.*, on behalf of Continental Broadcasting, Inc; and *Joseph Stirmer* and *James K. Edmundson, Jr., Esqs.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION
(Adopted November 26, 1968)

COMMISSIONER WADSWORTH FOR THE COMMISSION: CHAIRMAN HYDE DISSENTING AND ISSUING A STATEMENT: COMMISSIONERS COX AND H. REX LEE NOT PARTICIPATING.

1. This proceeding involves the application of Continental Broadcasting, Inc. (Continental or WNJR), a wholly owned subsidiary of Rollins, Inc.,[1] for renewal of license of AM station WNJR, Newark, N.J. Continental's

[1] Rollins, Inc., is a public corporation with its stock being listed on the American Stock Exchange. O. Wayne Rollins, the president of Rollins, Inc., and also of the licensee corporation, has owned about 48 percent of the voting stock in Rollins, Inc., since 1960, and together with his family has voting control of the corporation by virtue of their combined 67-plus percent ownership of the voting stock. The Rollins home office is in Wilmington, Del. Through direct ownership or control of wholly owned subsidiaries, Rollins, Inc., operates seven AM, three TV, and two FM stations.

renewal application[2] was designated for hearing by Commission order (FCC 65-514, released June 10, 1965) following a field investigation into the operations of the station which raised a number of questions bearing upon whether Continental possessed the requisite qualifications to remain the licensee of WNJR. The following issues were specified for hearing:

> 1. To determine whether in its written response to the Commission's Notice of Apparent Liability or in its oral statements to the Commission's staff the applicant misrepresented facts to the Commission and/or was lacking in candor;
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> 2. To determine whether the applicant falsely represented to the Commission or its staff that the 139 "contracts" submitted to the Commission's staff during the course of an investigation of WNJR were, in fact, the actual documents which the applicant allegedly required Celebrity Consultants to file with WNJR on behalf of each sponsor who advertised during "Celebrity Time"; or whether such "contracts" were falsified in order to conceal or misrepresent the actual facts with respect to the relationship which existed during the period of the latest renewal and up to the present, between the applicant, its employees and Celebrity Consultants;
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> 3. To determine whether the principals of the applicant have exercised adequate control or supervision over the operation of WNJR in a manner consistent with the applicant's

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[2] The license for station WNJR was last renewed on Feb. 8, 1961, for the period ending June 1, 1963. An application for renewal of license was filed on Mar. 13, 1963.

responsibility during the period of the applicant's most recent license renewal.

4. To determine whether the applicant operated its station contrary to and/or inconsistent with the provisions of section 317 (a)(1) and (c) of the Communications Act and sections 73.111, 73.112, and 73.119 of the Commission's rules;

5. To determine whether the applicant failed to file certain agreements regarding the sale of time periods to time brokers in violation of section 1.613(c) of the Commission's rules;

6. To determine whether, in light of the evidence adduced under the foregoing issues, the applicant has reflected the necessary qualifications to continue to be the licensee of station WNJR;

7. To determine whether a grant of the above-captioned application would serve the public interest, convenience, and necessity.

2. The *Initial Decision* of Hearing Examiner Isadore A. Honig (FCC 67D-26, released June 23, 1967) would grant WNJR's application and renew the license for a period of 1 year. The Commission's Broadcast Bureau filed exceptions to the *Initial Decision* and urges denial of the application. WNJR filed no exceptions but filed a reply to the Bureau's exceptions and urges that the examiner's decision be affirmed. The Commission heard oral argument on June 4, 1968. The examiner's findings have been considered in light of the exceptions and they are adopted with the modifications contained in this decision and in our rulings on the exceptions as set forth in the appendix. Since we do not agree with the examiner's ultimate conclusion that the application

for renewal of license should be granted, the conclusions of the *Initial Decision* are adopted only insofar as they are consistent with this decision and our rulings on exceptions. We do not adopt the examiner's conclusions in paragraphs 33 through 43.

3. Our review of the record evidence and the examiner's findings of fact and his subsidiary conclusions compels us to conclude that the applicant has not reflected the necessary qualifications to continue to be the licensee of WNJR and that a grant of the application would not serve the public interest.

4. It is unnecessary to restate in detail the examiner's extensive findings of fact. It is clearly established in the findings[3] that during an official Commission investigation of station WNJR on March 6, 1963, the manager of the station, Leonard Mirelson, was asked by Commission investigators to produce the documents relating to the program, "Celebrity Time." The manager made available to them only eight of 147 documents in the "Celebrity Time" program file and deliberately did not bring to their attention any of the remaining pertinent documents in his possession. The effect of the manager's conduct in selecting and handing over for inspection the small number of documents the investigators saw was to give them a distorted and misleading view of the manner of the operation of the program from the standpoint of control and the time-brokerage implications and to misinform them as to the arrangements with sponsors for the program in actual practice. The examiner concluded[4] as follows:

> Thus, the examiner concludes that the manager's action on the occasion in question in

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[3] See findings of the *Initial Decision*, pars. 68-71.

[4] See conclusions of the *Initial Decision*, par. 3.

not making available to investigators for inspection the entire file of the 147 documents for "Celebrity Time" constituted a serious lack of candor by an executive employee of the licensee in connection with an official Commission investigation.

5. As indicated by the findings,[5] on January 22, 1964, the Commission issued to the licensee of WNJR a notice of apparent liability for forfeiture, charging in essence that a Commission investigation of WNJR revealed the broadcast by the station for a period prior to March 9, 1963, of a program "Celebrity Time" pursuant to time brokerage contracts with an advertising agency, Celebrity Consultants, and that copies of the contracts with the time broker had not been filed by the licensee with the Commission within 30 days of execution as required by section 1.613(c) of the rules. The licensee filed a response and opposition to the notice on March 16, 1964,[6] contending in effect that the arrangement for the "Celebrity Time" program with the agency did not involve a time brokerage contract. Moreover, the response stated that in July 1962, station WNJR required the agency to enter into individual contracts with the station on behalf of each sponsor; that these contracts had been examined by the the FCC staff when it investigated this matter; and that the contract itself showed that the station had dealt with the agency as a regular advertising agency which was paid a commission and, therefore, not as a time broker. In footnote 5 to the response it was stated that the station considered its

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[5] See findings of the *Initial Decision*, pars. 77, 82-84.

[6] By a letter dated June 24, 1964, the licensee withdrew its response and opposition and also submitted a check in payment of the forfeiture.

earlier agreement with the agency terminated in July, 1962. The examiner concluded[7] as follows:

> Unquestionably, however, the evidence developed in the hearing shows (par. 84, of finding, supra) that the factual representations set forth in the sworn response and opposition to the Commission's notice of apparent liability for forfeiture, signed by O. Wayne Rollins as the licensee's president and filed with the Commission on March 16, 1964 were largely inaccurate.

The examiner also concluded (par. 4) that the inclusion of erroneous statements in the response as to when contracts with Celebrity Consultants had terminated involved negligence on the part of Rollins' associates.

6. Moreover, it is also clearly established[8] that on April 15, 1964, Commission investigators again visited station WNJR and asked to look at the contracts for advertising on the "Celebrity Time" program concerning which documents there had been representations made in the licensee's response of March 16, 1964. The WNJR station manager thereupon produced for inspection some 147 documents as being original contracts which had been executed between the station and the advertising agency on behalf of various sponsors on the "Celebrity Time" program during the period from July 1962 to March 1963. Only eight of these documents (those on top of the pile and white in color) were authentic and original contracts (WNJR Ex. 5, pp. 140-147) as represented by the licensee in its response. The remainder (139 documents on goldenrod-colored paper received in evidence as (WNJR Ex. 5 pp. 1-139) were not the actual or original documents which had been drawn up as

[7] See conclusions of the *Initial Decision*, par. 4.

[8] See conclusions of the *Initial Decision*, pars. 5-6.

contracts for advertising between WNJR and the advertising agency, Celebrity Consultants (WNJR Ex. 6, pp. 1-143). Instead, these 139 documents were fabricated or false contracts which had been prepared by a WNJR salesman at the direction of the station manager. The examiner concluded[9] as follows:

> In sum, the evidence does require the conclusion, in response to issue 2, supra, that: (1) the WNJR station manager falsely represented to the Commission's staff that the 139 documents turned over to them on April 15, 1964, during an investigation of WNJR were the actual documents received from Celebrity Consultants; and (2) that the 139 documents were falsified by a WNJR salesman, at the direction of the station manager, in order to conceal the actual facts of the relationship which existed in the period July 1962 to March 1963 between the applicant, its employees, and Celebrity Consultants.

7. We adopt the foregoing conclusions of the hearing examiner and further conclude that the manager's gross misconduct and fraud on the Commission must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee. *Eleven Ten Broadcasting Corp.* (KRLA), 32 FCC 706,22 R.R. 699 (1962), reconsideration denied 33 FCC 92, 22 R.R. 702n (1962), affirmed *sub nom. Immaculate Conception Church of Los Angeles, et al. v. FCC,* 116 U.S. App. D.C. 73, 320, F.2d 795, 25 R.R. 2128a (1963), cert. denied 375 U.S. 904 (1963); *KWK Radio, Inc.*, 34 FCC 1039 (1963), affirmed 119 U.S. App. D.C. 144, 337 F. 2d 540 (1964), cert. denied 380 U.S. 910 (1965).

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[9] See conclusion of the *Initial Decision*, par. 6.

8. The examiner found [10] that Wayne Rollins, president of Rollins, Inc., and of the licensee corporation, relied upon Al Lanphear, vice president in charge of radio, and Tim Crow, director of quality control, to effectuate supervision and control of the operations of the various Rollins radio stations, including WNJR. The findings and conclusions demonstrate that Rollins, Crow and Lanphear, the so-called home office officials in Wilmington, Del., failed to exercise adequate control and supervision over the operation of WNJR and the "Celebrity Time" program in particular. The station manager's lack of candor and misrepresentations in dealing with Commission investigators on March 6, 1963, the misstatements of fact in the opposition to the notice of forfeiture filed March 16, 1964, and the spurious documents furnished to the Commission's investigators on April 15, 1964, all involved the so-called agency show, "Celebrity Time," and the contracts for the program. However, despite the fact that the "Celebrity Time" program and the manner in which it was conducted was brought to the attention of the Rollins home office on several occasions, the home office officials at no time conducted a thorough or meaningful investigation of the matter.

9. The findings[11] show, for example, that on September 26 and 27, 1962, Crow and Frank Minner, the Rollins controller, visited station WNJR for the purpose of examining the operation of the station from the standpoint of observing the broadcast of programs on the air and of checking various records maintained at the station. On the evening of September 26, they monitored WNJR programs, including the broadcast of "Celebrity Time." The next day Minner compared the September

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[10] See findings of *Initial Decision*, par. 140; conclusions, par.

[11] See findings of the *Initial Decision* pars. 56-48, 76, 157.

26 program logs with station contract files and noted that for some announcements on the agency shows the station did not have individual contracts. Crow was told by Minner that there were some documents missing from several agency shows (Tr. 4715-16), but Crow did not look at any contracts or agency orders and did not examine the "Celebrity Time" contracts file. On his return to Wilmington, Crow wrote Rollins a report which made clear that a substantial number of clients were on the air without any contracts to cover them and which also raised questions concerning the "Celebrity Time" show (WNJR Ex. 44). Rollins discussed the matter with Lanphear. Lanphear visited WNJR on October 10 and 11, 1962 and questioned Mirelson as to whether he had the contracts for the individual sponsors, and Mirelson's reply indicated to Lanphear that he was obtaining them, but Lanphear did not examine any of the contracts for the special agency shows, including "Celebrity Time" (Tr. 5741-2).

10. The findings[12] also show that in August 1963, the Commission sent Norman King of Celebrity Consultants a letter (Br. Bur. Ex. 31) which made reference to a discussion by King with members of the Commission's staff during a week of July 21, 1963, concerning the former "Celebrity Time" program on station WNJR. A copy of the letter was given by King to Mirelson, who in turn brought it to the attention of Crow at the home office soon after August 8, 1963. The examiner found (par. 74) that "Crow saw the letter but made no inquiry of Mirelson at the time regarding the manner in which the 'Celebrity Time' program had been conducted or the other matters raised in the letter to King." Lanphear also saw the Commission's letter to King sometime in August 1963.

11. It is also noted that no investigation of the "Celebrity Time" program and contracts was made by

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[12] See findings of the *Initial Decision* par. 74.

the officials in the Rollins organization in Wilmington before making the sworn representations to the Commission in the response and opposition to the Commission's notice of apparent liability of January 22, 1964. The findings[13] show that Mirelson, the station manager, was never provided with a copy of the notice and neither read the document nor discussed it with anyone from the Rollins home office. He was not consulted as to whether the licensee should oppose the forfeiture but was merely requested by Crow to forward to him representative contracts pertaining to "Celebrity Time." The findings (pars. 86-87) show that Mirelson was not afforded an opportunity to read the response and opposition before it was filed with the Commission on March 16, 1964. Mr. Rollins assumed that Lanphear would discuss the proposed opposition and the charges in the notice of apparent liability with Mirelson since they pertained to the operation of, and directly affected, station WNJR, but he never inquired whether Lanphear had in fact done so. Furthermore, he did not instruct anyone to go and look at all of the contracts for "Celebrity Time" at station WNJR because of his confidence in Mirelson,[14] and because he had received from Crow three documents which the latter characterized as typical contracts for "Celebrity Time."

12 We believe that the examiner properly concluded (par. 29) as follows:

> At no time, however, was there any reasonably careful inspection of the "Celebrity Time" documents file made by the home

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[13] See findings of the *Initial Decision*, pars. 81, 85-87.

[14] On Jan. 21, 1963 (approximately a month and one-half before termination of the "Celebrity Time" program on Mar. 9, 1963), Mirelson had stated in a letter to Crow that "we now have separate contracts with all clients" (WNJR Ex. 49, examiner's findings, pars. 59, 81).

office to ascertain if WNJR was obtaining contracts for "Celebrity Time" in the form required under the home office instructions. In September 1962, the quality control director was shown some of the documents for the so-called agency shows which the Rollins controller had found were "not complete and accurate." There is no evidence to establish that such documents were part of the "Celebrity Time" file.[15] In any event, if Crow had made a review of the entire "Celebrity Time" file at that time, the variety of information in the documents representing advertising obtained by the freelancers and the pronounced difference in appearance between them and the eight contracts in proper form obtained by the station manager from the Celebrity Consultants agency head would immediately have signalled to him that the home office instructions had not been followed. Certainly he could not have failed to see, too, that the WNJR manager's signature did not appear on a single contract form. So far as appears from the record, the Rollins' home office did not examine the "Celebrity Time" contracts file for any purpose after September 1962.

13. It is obvious that a minimal degree of responsible supervision either during the period the "Celebrity Time" program was broadcast or following its termination could have averted the unconscionable fraud which Mirelson perpetrated on the Commission on April 15, 1964, as well as the misrepresentations of fact in the licensee's opposition to the Commission's notice of apparent liability filed March 16, 1964.

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[15] The examiner found (par. 56) that "neither Minner nor Crow recalled at the hearing whether these deficiencies detected by Minner on Sept. 27, 1962, related to 'Celebrity Time.'"

14. WNJR contends that its license should be renewed because the station manager's misconduct was committed without the knowledge or approval of the Rollins' home office officials, the manager misled both the licensee and the Commission, and his transgressions occurred in spite of attempted controls in the operation of the station.

15. In denying an application for renewal of license in the *KRLA* case, supra, we considered and rejected the licensee's contention that lack of knowledge absolved it from responsibility for the fraudulent conduct of its station manager. We said:

> Inherent in such contention, however, is the view that a licensee who delegates to persons it deems responsible, authority to operate and manage a station cannot be held responsible for their activities if it is unaware of them. This is, of course, a completely untenable view. Retention of effective control by a licensee of the station's management and operation is a fundamental obligation of the licensee, and a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control. (Citing *Mile High Stations Inc.* (KIMN), 20 R.R. 345 (1960)).

16. In the instant case, the examiner concluded (par. 32) that the licensee did not exercise adequate control or supervision over the operation of WNJR in a manner consistent with the licensee's responsibility during the most recent license renewal period (1961-64). We adopt this conclusion because it is supported by the record evidence and the examiner's findings of fact. We do not share or accept the examiner's view (par. 42) that the licensee's deficiency on this score was not

characterized by lack of interest in or lack of concern for, the proper conduct of the station's affairs.

17. The examiner's findings and conclusions clearly show that the principals of the licensee failed to exercise minimal, let alone a reasonable degree of care in determining the status of the "Celebrity Time" contracts file and the manner in which the program was conducted. It is evident that the station manager was able to conduct the "Celebrity Time" program in the haphazard manner shown by this record because of the detachment and indifference of the Rollins' home office officials.

18. The record and the examiner's findings and conclusions[16] show that the control measures utilized by the home office in Wilmington consisted of periodic monitoring (22 monitors between February 1961 and October 1964) of WNJR broadcasts by a person not employed within the Rollins organization, and comparison by Crow of the data compiled with the program logs. In addition to these monitors, the record shows that between September 1962 and December 1964, Crow personally conducted only three operations audits of WNJR, involving taping of programing, examination of logs and contracts files. Lanphear, the operational head for radio stations, made only periodic visits to confer with the WNJR station manager. Wayne Rollins occasionally called the WNJR manager on some particular matter of concern to him.

19. The examiner himself concluded (par. 28) that the above described control and supervisory activities of those in the Rollins home office did not suffice to prevent serious violation of Commission's *Rules* and Rollins' policies as well as misconduct by station employees which reflect adversely upon the renewal applicant.

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16 See conclusions of the *Initial Decision*, par. 26.

20. We agree with the examiner's following statement in his conclusion (par. 32):

> It is not enough that a licensee should issue instructions, detect infractions, make occasional visits, and engage in endless correctional correspondence with its station manager. The licensee of a broadcast station has the paramount obligation to apply effective measures to forestall violations and, in those instances where they nevertheless do happen despite reasonable preventive measures, to take additional steps as required to assure against any recurrences. This obligation the licensee herein obviously failed to discharge. In this connection, the examiner is constrained to point out that the evening hours period of operation at station WNJR received not alone from the station manager but also from the principals of the licensee far less direct supervision than was required in order to maintain proper control.

21. WNJR contends that the Rollins home office, through its regular control procedures, would have discovered the true facts concerning "Celebrity Time" and its contracts before the Commission investigation if the manager had not withheld this information from the home office. This contention is not supported by the record. As shown above, the home office was on notice as early as September 1962, that not all contracts for the agency shows were in the files, it was on notice that the logging procedures for the "Celebrity Time" program were not being followed, and it was on notice that other questions concerning the manner of operation of the "Celebrity Time" program had been raised, but, as stated by the examiner, "at no time, was there any reasonably careful inspection of the 'Celebrity Time' documents file made by the home office."

22. WNJR also contends that the KRLA and the *KWK* cases, supra, are not applicable here because those cases are based on licensee indifference to control of station operation, whereas in this case there was no such indifference to control of station operation, whereas in this case there was no such indifference on the part of the licensee. In the *KRLA* case we said that a licensee's lack of familiarity with station operation and management may reflect an indifference tantamount to lack of control. In the *KWK* case we said[17] that because of the licensee's "detachment, if not indifference" to the details of the treasure hunts involved, it was evident that the station manager was able to move unrestrained in his fraudulent hiding of the treasures. We believe that the record in this case clearly shows that it was the licensee's detachment and indifference and its failure to exercise adequate control and supervision over the operation of the station that permitted the station manager to perpetrate a gross and willful fraud on the Commission during the course of an official investigation.

23. The cases cited by WNJR, *Mark Twain Broadcasting Co.*, 21 R.R. 238 (1960), and *Washington Broadcasting Co. (WOL)*, 8 R.R. 2d 1267 (1966), are inapposite to this proceeding. In the *Mark Twain* case, which involved an application for renewal of license, the examiner concluded that there was no intent to deceive the Commission, and that the discrepancies in the transmitter logs filed with the Commission were of an engineering nature and not readily discernible by the principal officer and stockholder who had only limited technical knowledge. No exceptions were filed in that case and the Broadcast Bureau filed a statement in support of the *Initial Decision.* The Commission, by order, made the *Initial Decision* effective immediately (29 FCC 1313 (1960)). In the *WOL* case, which involved an assignment

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[17] 34 FCC 1039, at 1042.

of license, the proposed assignee filed with the Commission as part of its application a program survey containing falsehoods of an employee that a certain person had been interviewed in connection with the survey. The examiner concluded that the misrepresentation made to the Commission through the employee did not attach to the principals of the assignee, because the latter were not negligent concerning the conduct of the employee and "took immediate steps to investigate all the facts surrounding the matter" as soon as a question was raised (8 R.R. 2d 1267 at 1291). In the instant case, the licensee was repeatedly on notice but made no meaningful investigation to determine the facts.

24. In evaluating the responsibility of the licensee for the actions of its manager, the examiner stated in paragraph 34 of his conclusion that while "the licensee here cannot avoid responsibility for the misconduct of its station manager in dealing with the Commission. Nevertheless, in making a judgment as to the licensee's qualifications to retain the status of a licensee, it is important to bear in mind that the WNJR manager was not a 'principal' of the licensee." The Broadcast Bureau contends that Mirelson, the station manager, should be considered a principal of the licensee rather than a mere employee. We note that in reaching his conclusion that Mirelson was not a "principal" of the licensee, the examiner found that his stock ownership in Rollins, Inc., the parent corporation of the licensee, never exceeded 5,100 shares (less than two-tenths of 1 percent of the total ownership); that he was never an officer or director of the licensee corporation or of Rollins, Inc.; and that whatever policy functions he exercised as manager had in effect been delegated to him by the Rollins home office in Wilmington. We also note that the examiner found Crow to be a principal, although he was neither an officer nor director and owned less than 2,500 shares in Rollins, Inc. (less than one-tenth of 1 percent ownership interest).

25. We believe that there are compelling facts of record which indicate that the station manager, in effect, was a principal of the licensee and not a mere employee. The record clearly establishes that Mirelson was the general manager of station WNJR and as such was the individual charged with full responsibility for directing the day-to-day operation of the station. He had a compensation arrangement whereby, in addition to salary, he shared on a graduated basis in the net profit of WNJR. He owned stock in Rollins, Inc., the parent of the licensee, and his stock holdings exceeded that of Crow and Lanphear who were found to be principals.[18] Even after the Rollins home office became fully aware of his gross fraud on the Commission, he nevertheless continued in his same capacity and under the same financial arrangements for over 7 months, at which time he was made regional sales manager of WNJR, the position he now holds. We believe that these facts are fully consistent with the conclusion that Mirelson was a principal and not a mere employee. We have held that the fact that a station manager is not an officer or director of a licensee is irrevelant in determining the licensee's responsibility for his conduct. See *Eastern Broadcasting Corp.*, 8 FCC 2d 611 (1967). We do not base our decision on a determination that Mirelson is a principal of the licensee. We hold that the licensee must be held responsible for the gross misconduct of its station manager under the circumstances shown in this case where it has been clearly established that the licensee failed to exercise adequate control and supervision over the operation of the station consistent with its licensee responsibilities.

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[18] During oral argument counsel for the Broadcast Bureau and counsel for WNJR made reference to Mirelson's stock ownership as being worth a third of a million dollars (Tr. 6828 and 6832). We do not, however, accept this valuation as an established fact of record, and therefore, give it no weight.

26. In addition to the foregoing misrepresentations and fraud practiced on the Commission, there are other examples of what occurred as a result of the licensee's failure to exercise an effective sense of responsibility for station operation and management.[19] The examiner found (par. 137) that as early as December 1961, the Rollins' home office became aware, through an examination of the WNJR program logs by Crow, that the log had not been maintained for over one-half hour during the period the "Celebrity Time" program was broadcast on November 30, 1961. The examiner further found and concluded (pars. 17 and 28) that during the succeeding 9-month period between January 1 and September 25, 1962, there were 64 days (or 28 percent of the time) when the program log during the "Celebrity Time" program was not maintained. Moreover, during this same period, there were numerous instances when no elapsed time for commercial announcements on "Celebrity Time" was shown but only the beginning thereof. This particular logging violation was committed on 103 of the "Celebrity Time" programs. Furthermore, between

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[19] The examiner concluded (par. 31) that the listening public was not assured of a desirable broadcast service from several aspects of the manner of operation of WNJR in the period under consideration. The examiner concluded, in part, as follows:

> "Finally the nadir in programing service emanating from WNJR appears to have been reached with the identical half-hour program was broadcast five evenings in the same week. It is questionable whether the service provided by the station was much better when 3-hour programs broadcast on Wednesday and Thursday were again repeated on tape on Friday of the Saturday of the same week. Moreover, despite an understanding between the station manager and the announcer on the program not to repeat such program more than one time, a particular 3-hour program was not only rebroadcast on Nov. 25, 1964, but also repeated on Nov. 26 and 28, and Dec. 1."

January 1962 and March 1963, there were many occasions when a contemporaneous program log for the "Celebrity Time" program was not maintained.

27. We also rest our denial of the renewal application on the licensee's lack of licensee responsibility as evidenced by its inattention to the station and the operation thereof in violation of sections 73.111 and 73.112 of our rules concerning proper maintenance of program logs (issue No. 4). The examiner concluded (par. 16) that during the license period under consideration, the Rollins' home office was repeatedly made aware that accurate program logs were not being maintained by WNJR. The examiner concluded in this regard that his findings demonstrate numerous instances where the lengths of commercials were incorrectly reported in the WNJR program logs; instances where commercial announcements were not logged; instances where announcements were logged at times other than the actual times of broadcast; and instances (two) where the logs contained a forged signature in the operator's column. The examiner further concluded (par. 16) that "the aforementioned logging infractions were committed between August 1961 and December 1964 and require the conclusion that the licensee repeatedly failed to comply with the provisions of section 73.111[20] and 73.112 of the rules due to the failure of WNJR properly to maintain program logs." The examiner also concluded (par. 17) that the logging deficiencies which occurred in the "Celebrity Time" program "constituted further violations of sections 73.111 and 73.112 of the rules."

28. In addition to the foregoing, the examiner also concluded (par. 15) in response to issue No. 5, that "the licensee entered into five time brokerage contracts

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[20] The reference in par. 16 of the conclusions to sec. 73.113 of the rules is an obvious typographical error, this reference should read sec. 73.111.

between May 1963 and March 1964," and that "the licensee wilfully and repeatedly violated section 1.613(c)[21] of the rules by failing to file each of these contracts with the Commission within 30 days of its execution."

29. The examiner concluded (pars. 20, 21, and 22) that no violation of section 317(a)(1) of the Communications Act and section 73.119 (a) and (b) of the rules occurred by reason of WNJR's failure to broadcast sponsorship identification announcements in the case of those freelancers who appeared on "Celebrity Time" and made payments indirectly to the station for program time, and in the case of those time brokers who made payments to WNJR for program time out of their own pockets when they did not receive sufficient revenue from sponsors. The examiner was of the view that the payments made by the freelancers in connection with their appearance on "Celebrity Time" was not made for the broadcast of "matter" within the sponsorship identification provisions of the act and rules since, at most, they were interested in obtaining personal exposure on the air. The examiner also concluded that in the case of Joe Craine, one of the parties to a time brokerage arrangement with WNJR, no sponsorship identification announcement was required because the only "benefit" he derived from his broadcast was his exposure as an announcer.

30. The Broadcast Bureau has excepted to the examiner's above conclusions as an erroneous interpretation of the law and contends that it should be concluded that an individual or agency purchasing broadcast time under the circumstances shown must be announced as a sponsor pursuant to section 317(a)(1) of the act.[22] We

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[21] The reference in par. 15 of the conclusions to sec. 1.316(c) of the rules is a typographical error, and this reference to the rules should read sec. 1.0613(c).

[22] 47 U.S.C. sec. 317(a)(1).

agree with the Bureau and, therefore, do not adopt the examiner's conclusions in paragraphs 20, 21, and 22. Section 317(a)(1) of the act provides that all matter broadcast by any radio station for which any money, service, or other valuable consideration is directly or indirectly paid the station so broadcasting, by any person, shall, at the time the same is so broadcast, be announced as paid for by such person. Section 73.119 of the rules implements this statutory provision. The language of the act is clear and includes "all matter" broadcast for which payment is made to the station. The "benefit" derived by the purchaser of the broadcast time is not the determinative factor as to whether an announcement should be made. In the *Matter of the Liability of United Broadcasting Co. of New York, Inc.*, 4 R.R. 2d 167 (1965), the Commission held that where a time-broker arrangement was contemplated, but the purchaser of the time never sold it, and, during the broadcast period involved, the time was the exclusive property of the purchaser, an appropriate announcement was required by section 317 of the act and rule 73.119.

31. WNJR contends that the questions raised by the Bureau concerning sponsorship identification appear to be ones of novel impression which, it feels, have been correctly decided by the examiner, but that if the Commission should hold the examiner in error, the rulings should be given prospective effect only and not applied retroactively. We believe that the language of the act is clear and that the questions raised are not novel. Although we find that WNJR failed to make proper sponsorship identifications, we reach our ultimate determination in this case without reliance on these violations of the act and the Commission's rules.

32. As we have indicated above, the Commission must insist upon the effective exercise by the licensee of actual control over station operation and management, and it is only by holding the licensee accountable for the

operation and management of the station that there can be any assurance that the operation and management will be responsible. The degree of responsibility imposed and the standard of conduct required are the same for all licensees, irrespective of their form or the relative size of their operations. (See *Prattville Broadcasting Company*, 4 FCC 2d 555 (1966), citing *KWK Radio, Inc.*, supra, and *Eleven Ten Broadcasting Corp.*, supra.) A multiple station owner, or an absentee owner, is subject to the same degree of responsibility for adequate supervision and control over station operation as a local station owner who is integrated in ownership and management. To hold otherwise would result in giving an added benefit to absentee ownership as compared to local ownership.

33. It appears that in reaching his conclusion (par. 43) that a renewal of license for a period of 1 year would be appropriate, the examiner may have been influenced by the fact that the licensee has now taken certain corrective measures to forestall the recurrence of the filing violations as well as the misrepresentations to the Commission and has acted "to clear the Augean stable at Newark." However, a renewal applicant must be judged even more on the basis of its past than on its promises for the future. We must look to that record in determining whether the applicant herein has reflected the necessary qualifications to continue to be a licensee. Viewing that record in a light most favorable to the applicant, we are compelled to conclude that it has not reflected the necessary qualifications to continue to be the licensee of station WNJR.

34. The facts as found in this case are irreconcilable with a public interest finding. We have carefully examined the entire record in this proceeding, and we are unable to find any mitigating circumstances which would justify a grant of a renewal of license even for a period of 1 year. While nonrenewal of the license is a severe sanction, we have reached this decision only after

a thorough consideration of the entire fact situation. See *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

35. Accordingly, *It is ordered*, That the above-captioned application (BR–174) of Continental Broadcasting, Inc., for renewal of license of Station WNJR, Newark, N.J., *Is denied;* and

36. *It is further ordered*, That in order to enable Continental Broadcasting, Inc., to wind up its affairs, *It is authorized* to operate station WNJR until 12 midnight December 31, 1968.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

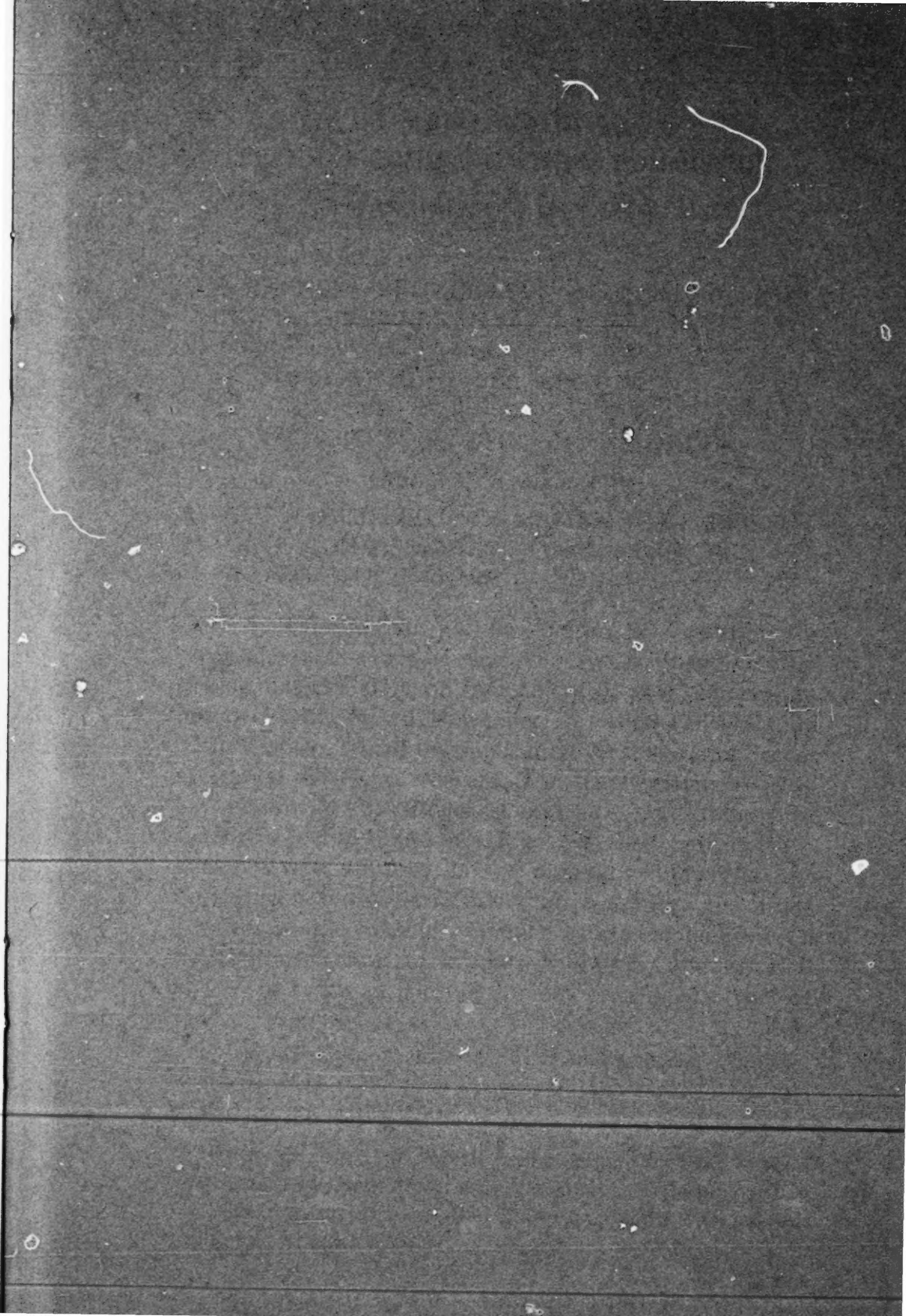
APPENDIX

RULINGS ON BROADCAST BUREAU'S EXCEPTIONS TO INITIAL DECISION

Exception No.	*Ruling*
1, 5	Granted to the extent indicated in the decision and denied in all other respects as being unnecessary for the purposes of the decision.
2	Granted as indicated in par. 9 of the decision.
3, 6	Denied as being unnecessary for the purposes of the decision.
4	Granted as indicated in par. 11 of the decision.
7-9	Granted as indicated in pars. 30-32 of the decision.
10	Granted as indicated in pars. 8 and 13 of the decision.
11-17	Granted as indicated in the decision.

DISSENTING STATEMENT OF CHAIRMAN ROSEL H. HYDE

I believe there should be a substantial penalty but that denial of license and deletion of the station is not warranted.



BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
CONTINENTAL BROADCAST-	)	Docket No. 16050
ING, INC., NEWARK, N.J.	)	File No. BR-174
For Renewal of License of	)	
Station WNJR, Newark, N.J.)		

MEMORANDUM OPINION AND ORDER

(Adopted May 1, 1969)

BY THE COMMISSION: CHAIRMAN HYDE DISSENTING; COMMISSIONERS COX AND H. REX LEE NOT PARTICIPATING.

1. The Commission has before it a petition for reconsideration and rehearing filed by Continental Broadcasting, Inc. (WNJR), on December 26, 1968, directed to our decision released November 27, 1968 (15 F.C.C.2d 120),[1] which denied the application for renewal of license of station WNJR at Newark, N.J. The Commission also has before it the Broadcast Bureau's opposition filed January 17, 1969, and WNJR's reply filed February 17, 1969.[2] WNJR requests, in the alternative: (1) That the Commission reconsider its decision and adopt the initial decision of the hearing examiner which recommended a short term renewal of license; or if the Commission is unable to reach such result for any reason, (2) that the

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[1] Commissioner Wadsworth for the Commission; Chairman Hyde dissenting and issuing a statement; Commissioners Cox and H. Rex Lee not participating.

[2] On Apr. 18, 1969, WNJR filed a petition for leave to file a supplement to its petition for reconsideration and rehearing and an accompanying supplement. The Broadcast Bureau opposed this petition on Apr. 30, 1969.

record be reopened to consider information bearing on the performance of WNJR, submitted with the petition. The Broadcast Bureau opposes the petition on the ground that WNJR has failed to provide any legal or factual basis for reconsideration.

2. Before considering each of the contentions made by WNJR in its petition for reconsideration, we believe it desirable to discuss certain statements made by WNJR in its reply to the Broadcast Bureau's opposition, concerning the basis of our decision. WNJR states (reply, pp. 5-6) that "this is not a case where the licensee has been held to have deceived the Commission"; that "the Commission expressly held that it was not basing its decision on any ruling that the conduct of Mirelson (the station manager) was chargeable as a misrepresentation to the licensee"; and that "the basis of the Commission's decision was limited solely to the holding that Rollins had not exercised adequate control over the station as a licensee." These statements do not correctly reflect our holding in this case on the question of misrepresentation and fraud and the licensee's responsibility for such deception and its consequent lack of qualifications to continue to be a licensee.

3. In our decision (par. 7) we adopted the examiner's findings and conclusions as to the concealment, misrepresentation, and fraud practiced by the station manager on the Commission and we expressly held that "the manager's gross misconduct and fraud on the Commission must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee." We cited as support for our holding our decisions in the *KRLA* and *KWK* cases,[3]

[3] *Eleven Ten Broadcasting Corp. (KRLA)*, 32 F.C.C. 706, 22 R.R. 699 (1962), reconsideration denied 33 F.C.C. 92, 22 R.R.

(Footnote 3 continued on next page)

where we denied a renewal and revoked a license, respectively, because of misrepresentation and fraud imputed to the licensees and for which the licensees were held responsible. The instant case involves gross misrepresentation and fraud practiced on the Commission and the licensee must be held responsible for the misconduct involved. In light of the evidence adduced under the issues, we concluded in our decision that the applicant did not have the necessary qualifications to continue to be a licensee of station WNJR. In accordance with the *WOKO*[4] principle, we held that the application for renewal of license should be denied.

4. WNJR contends, first, that we failed to give proper weight to the record of the licensee in establishing and maintaining controls over the operation of the station and that such controls refute any conclusion that the licensee was indifferent to its responsibilities. We recognized in our decision that the Rollins home office instituted a number of control procedures for its stations, including station WNJR, and we fully considered those procedures as set forth in the examiner's conclusions, paragraphs 24-27. In paragraph 18 of our decision we made specific reference to some of the more direct control procedures employed. However, we agreed with the examiner's conclusions (par. 28), to which no exception was taken by WNJR, that the described control and supervisory activities of those in the Rollins home office did not suffice to prevent serious violations of the

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(Footnote 3 continued from page 2)

702n (1962), affirmed *sub nom. Immaculate Conception Church of Los Angeles, et al.* v. *FCC* 116 U.S. App. D.C. 73, 320 F. 2d 795, 25 R.R. 2128a (1963), cert. denied 375 U.S. 904 (1963); *KWK Radio, Inc.*, 34 F.C.C. 1039 (1963), affirmed 119 U.S. App. D.C. 144, 337 F. 2d 540 (1964), cert. denied 380 U.S. 910 (1965).

[4] *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946).

Commission's rules as well as misconduct by station employees which reflect adversely on the renewal applicant. We do not agree with WNJR's contention that our evaluation improperly treats the question of the licensee's responsibility for station operation and staff performance. The preponderance of the record evidence supports the examiner's conclusion (par. 32), to which no exception was taken by WNJR and which we adopted in our decision (par. 16), that the licensee did not exercise adequate control or supervision over the operation of station WNJR in a manner consistent with its licensee responsibilities.

5. WNJR contends, next, that it should not be held responsible for the fraudulent acts of its manager, because he deliberately withheld the facts from the Rollins principals and they acted reasonably under the circumstances. WNJR made substantially the same argument in its reply to the Broadcast Bureau's exceptions and in its oral argument, and we considered and rejected the contention in our decision. The deliberate fraud practiced on the Commission by the station manager in connection with the "Celebrity Time" program and contacts is clearly established in the record. The fact that the licensee was misled by the actions of its manager in withholding facts from it and the fact that such actions were undertaken by him to protect his position with the home office, do not alter the fact that a gross and willful fraud was practiced on the Commission for which the licensee must be held responsible because of its failure to exercise adequate control and supervision over the operation of the station.

6. As set forth in our decision, the Rollins home office was repeatedly on notice, even as early as 1962, that questions concerning the manner of operation of the "Celebrity Time" program had been raised, but, as concluded by the examiner (par. 29), "at no time, was there any reasonably careful inspection of

the 'Celebrity Time' documents file made by the home office." As noted in our decision (par. 13), it is clear that a minimal degree of responsible supervision either during the period that the "Celebrity Time" program was broadcast or following its termination could have averted the unconscionable fraud which the station manager perpetrated on the Commission on April 15, 1964. WNJR now claims that when Rollins first became aware that something was wrong with the contract file for the "Celebrity Time" program, it immediately conducted its own investigation which unearthed the original contracts. However, what WNJR fails to make clear in this regard is that its investigation was not initiated until May 5, 1964, which was after the fraud had been perpetrated on the Commission and which was after the Commission sent a letter, dated April 23, 1964, to the licensee requesting answers to a number of questions concerning the bogus "Celebrity Time" documents which had been furnished to it on April 15, 1964 (examiner's findings, pars. 100-106).

7. WNJR contends, third, that our decision in this case is inconsistent with our decision in *Lamar Life Broadcasting Co. (WLBT),* 14 F.C.C. 2d 431 (1968), because we gave no weight to the corrective action taken by Rollins in this case, but did rely on corrective action by the licensee in the *Lamar* case. WNJR claims that under the doctrine of *Melody Music, Inc.* v. *FCC* 345 F.2d 730 (1965), both cases were required to be decided on the same principle, or the differences had to be explained. The fundamental distinction in the two cases is that in the *Lamar* case allegations of past serious misconduct were found not to have been proven, and it was only after the past misconduct was adjudged unsubstantiated that the more recent programing record of WLBT was considered (14 F.C.C. 2d at 437). In the instant case we found the applicant disqualified on the basis of its past misconduct. In this case the licensee's

past misconduct and its lack of requisite qualifications to be a licensee have been adjudged to be fatal to the station's renewal application. Our decision in this case is consistent with our holding in the *KRLA* and *KWK* cases, supra, where we did not permit current good performance to rehabilitate past bad conduct which warranted denial of a renewal application and revocation, respectively. Compare *FCC* v. *WOKO, Inc.*, supra. In the *Lamar* case the issues specified were resolved in the licensee's favor because the charges against the applicant were not proved. In the instant case we have resolved the issues adversely to the licensee because the charges have been proved, and we have concluded that the applicant does not possess the necessary qualifications to remain the licensee of station WNJR.

8. WNJR also claims that we have imposed in this case a more severe penalty than we did in a number of other cases where we excused certain conduct or imposed a forfeiture rather than denying a renewal of license.[5] None of the cases cited, however, involved a gross and willful fraud of the nature practiced in this case and none involved a failure on the part of the licensee to exercise adequate control and supervision over the operation of its station to the extent clearly established by the record in this case. Our choice of sanction in this case is based upon our consideration of the entire fact situation, and we believe that denial of renewal is the proper sanction under all of the circumstances. See *FCC* v. *WOKO, Inc.*, supra, and *Lorain Journal Company* v. *FCC*, 351 F.2d 824 (1965), cert, denied sub nom. *WWIZ, Inc.*, v. *FCC*, 383 U.S. 967 (1966).

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[5] WMJR cites the following cases: *United Broadcasting Co., Inc.*, 4 F.C.C. 2d 293 (1966); *Mark Twain Broadcasting Co.*, 21 R.R. 238 (1960); *Washington Broadcasting Co. (WOL)* 8 R.R. 2d 1267 (1966); *Dover Broadcasting Co.*, F.C.C. 62-1287 (1962); *Arthur Powell Williams*, 7 F.C.C. 2d 519 (1967); and *Meyer Broadcasting Co. (KFYR-TV)*, F.C.C. 64-104 (1964).

9. WNJR contends, finally, that we failed to give proper consideration to its overall program performance, particularly its public service programing, in evaluating its qualifications as a licensee. WNJR submitted with its petition letters from various organizations and other material which it claims demonstrate the character of its service, in the event the Commission is in doubt about its performance. WNJR requests that the record be reopened for consideration of these matters if the Commission cannot conclude that its performance was highly metitorious and outweighed the deficiencies which underlay the Commission's decision.

10. WNJR's overall program service was not placed in issue in this proceeding. The order of designation contained no general programing issue and none was requested by WNJR. The record shows that during the hearing, when asked about the matter by the examiner, counsel for WNJR stated that he did not intend to make any overall program showing by way of mitigation (T. 94-95) and further stated that "The question of actual programing was not in issue" (T. 3516). No attempt was made to adduce programing evidence at the hearing. WNJR now claims that consideration of its overall program performance is required because we relied upon programing considerations in our decision (footnote 19), and because all aspects of its program performance must be considered. It should be obvious from our decision that we did not rely on WNJR's program performance in arriving at our conclusion that the applicant did not have the necessary qualifications to continue to be the licensee of station WNJR. We decided this case on the basis of the evidence adduced under the issues specified in the order of designation. In footnote 19 we merely pointed out the examiner's conclusion as to what occurred as a further consequence of the licensee's lack of adequate control and supervision over the operation of the station. The question of the adequacy of the control

and supervision exercised over the station was specified in issue 3.

11. In the *KRLA* case, supra, where we denied a renewal of license because of the licensee's misconduct, it was contended on appeal to the U.S. Court of Appeals for the District of Columbia Circuit[6] that the Commission erred in failing to make findings as to KRLA's public service programing and to consider the public service rendered by KRLA in determining whether or not KRLA's license should be renewed. In affirming the Commission's decision, the Court said: "The Commission need not consider the public service rendered by a station where the licensee is disqualified by its attempts to deceive the Commission,"[7] citing *FCC* v. *WOKO, Inc.*, supra. This holding was subsequently cited with approval by the Court in *Lorian Journal Co.* v. *FCC*, supra. We believe that these decisions are controlling in this case. As stated above (pars. 2-3), this proceeding involves a gross misrepresentation and fraud practiced on the Commission by the licensee. We have found the licensee lacking in the necessary qualifications to continue to be a licensee. WNJR's request that the record be reopened for consideration of its public service programing will be denied.

12. On April 18, 1969, WNJR filed a supplement to its petition for reconsideration in which it contends that our recent actions in imposing forfeitures in the cases of *Camden Broadcasting Corp.* (WACA), F.C.C. 69-330, and *B & G Broadcasting, Inc.* (WJSW), F.C.C. 69-361, demonstrate a disparity in the treatment of WNJR and other licensee found guilty of violations and require that the sanction of forfeiture be considered as

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[6] *Immaculate Conception Church* v. *FCC*, 116 U.S. App. D.C. 73, 320 F.2d 795, cert. denied, 375 U.S. 904 (1963).

[7] 320 F. 2d at 797.

an alternative to the more severe action of denial of renewal of license in this case. In the *WACA* and *WJSW* cases we were of the view that the violations, although of a serious nature, did not warrant the institution of revocation or renewal proceedings. In each of those cases the Commission was not convinced that the charges against the licensee, if proven in an evidentiary hearing, would be sufficient to result in disqualification. Hence, a forfeiture was deemed the appropriate sanction. In the instant case, however, the WNJR renewal application was designated for hearing because of serious questions bearing in the qualifications of the applicant to remain the licensee of station WNJR. After hearing and based on the record evidence adduced under all of the issues, we determined that the licensee did not possess the necessary qualifications to continue to be the licensee of station WNJR. Since the applicant was found disqualified, we of course also concluded that a grant of the renewal application would not serve the public interest. It obviously would be contrary to the public interest and manifestly improper to permit a disqualified applicant to continue as a licensee through the imposition of a forfeiture. The *WACA* and *WJSW* cases provide no basis for a reconsideration of our resolution of the licensee qualifications issue in this case, and, consequently, provide no basis for the imposition of forfeiture in lieu of denial of the renewal application.

13. Accordingly, *It is ordered,* That the petition for leave to file supplement to petition for reconsideration and rehearing filed April 18, 1969, by Continental Broadcasting, Inc., *Is granted;* and

14. *It is further ordered,* That the petition for reconsideration and rehearing filed December 26, 1968, by Continental Broadcasting, Inc., *Is denied;* and

15. *It is further ordered,* That in order to enable Continental Broadcasting, Inc., to wind up its affairs, *It*

is authorized to operate station WNJR until 12:01 a.m., July 1, 1969; *Provided, however*, That if Continental seeks judicial review of our decision released November 27, 1968 (15 F.C.C. 2d 120) and/or of this memorandum opinion and order, Continental is authorized to continue to operate station WNJR until thirty (30) days after the final disposition of such appeal.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

SUPREME COURT, U.S.
FILED

IN THE

Supreme Court of the United States

October Term, 1970

No. 1597

CONTINENTAL BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEONARD H. MARKS
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April 19, 1971

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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IN THE

Supreme Court of the United States

October Term, 1970

No.

CONTINENTAL BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Continental Broadcasting, Inc. (Petitioner) prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in which the Court of Appeals affirmed the decision of the Federal Communications Commission denying Petitioner's application for renewal of its license to operate Radio Station WNJR, Newark, New Jersey.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) has not yet been officially reported. It is unofficially reported at 20 Pike and Fischer Radio Regulation 2d 2126 (1971).

JURISDICTION

The judgment of the Court of Appeals was entered January 5, 1971 (Appendix B), and a Petition for Rehearing was denied by the Court on February 10, 1971 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 2101 and 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals and the Federal Communications Commission denied Petitioner due process of law, and deprived it of its constitutional right of equal protection under law, by applying to Petitioner criteria and principles of judgment different from those which the Commission and the Court regularly apply to other applicants similarly situated.

CONSTITUTIONAL PROVISIONS

The pertinent sections of Amendments V and XIV to the Constitution of the United States are set out in Appendix D.

STATEMENT

This Petition seeks review of a decision by the United States Court of Appeals for the District of Columbia Circuit affirming the Federal Communications Commission's denial of Petitioner's application for renewal of its license to operate Radio Station WNJR, Newark, New Jersey. Petitioner will demonstrate that the Court and the Commission arbitrarily and erroneously used standards of judgment in assessing Petitioner's application different from those used in the past (and being used to this very day) by the Commission to

assess qualifications of other Commission licensees similarly situated. The failure of the Court and the Commission to apply the same standards of judgment to Petitioner as have traditionally been applied to other licensees, improperly and illegally discriminated against Petitioner and has denied it the equal protection of law to which it is entitled under constitutional guarantees embodied in the Fifth and Fourteenth Amendments.

Station WNJR has been licensed to and operated by Petitioner for over 16 years. Its primary responsibility has been to serve the broadcast needs of the black population of Newark, New Jersey and environs, and, indeed, it was one of the first broadcast stations in the United States to acknowledge the singular need of black citizens for radio service, and to undertake to fulfill those needs. Throughout the entire record of its stewardship, as the Commission conceded, no question has been raised as to the manner in which the station has been meeting its public programming responsibilities, nor has the Commission ever raised any question concerning the adequacy or sufficiency of the station's broadcast performance. The proceedings surrounding Petitioner's application for renewal of its license have related solely to internal station affairs, *i.e.*, alleged derelictions in failing to keep proper program logs, failing to file certain time brokerage contracts with the Commission, and the facts and circumstances surrounding an acknowledged misrepresentation made by the station's manager to representatives of the Commission during a Commission investigation.[1]

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[1] As was recognized by the Commission and the Court, the station manager's misrepresentation was made completely without the knowledge or complicity of the station's stockholders, officers and directors. The station manager, in fact, made the same misrepresentation to his employer as was made to the Commission's

(Footnote one continued on next page)

These matters formed the basis for lengthy evidentiary hearings, as a result of which a Commission Hearing Examiner found that (1) the station's manager had misrepresented and concealed certain facts from the Commission's staff during an investigation, although the station manager's primary purpose in so doing was to mislead his employers as to the quality of his own performance, and the misrepresentation to the Commission was essentially an outgrowth of the manager's intent to mislead his employers; (2) the station had failed to timely file certain time brokerage contracts;[2] and (3) the licensee's principals had failed to exercise adequate control or supervision over the station's internal log keeping matters in a manner fully consistent with its responsibility as a licensee.

The Examiner concluded, however, that because (a) the principal officers, directors and stockholders of the licensee had not been guilty of knowing participation or compliance in the misrepresentation and misconduct of their station manager, (b) because they had *in fact* manifested an interest in, and concern for, the proper conduct of the station's affairs, and (c) because they had acted, although tardily, to correct the deficiencies

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(Footnote one continued from page 3)

investigators, and the primary purpose of the misrepresentation was to protect the station manager's *own* position vis-a-vis his employers. At no point did the station's principals condone the misrepresentation and, indeed, when they first became aware of it they immediately reported the full facts concerning it to the Commission.

[2] The Examiner recognized that the state of the law at that time was somewhat confused as to the precise definition of "brokerage contract," and that Petitioner had been informed by its counsel that its contracts need *not* be filed.

through the institution of more strict control devices, the Examiner recommended that the appropriate sanction to be applied, in light of the Commission's past precedents, was that the station's license should be renewed for a 1-year "probationary" period, rather than for a full three year term.

The matter was argued before the full Commission which, after adopting the Examiner's findings and his conclusions with respect to the acts of the station manager, reversed the Examiner's decision and concluded that the license renewal application should be denied because the manager's misconduct "must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibility as a licensee" (15 FCC 2d at p. 123).[3] In so concluding, the Commission refused to give any weight to the licensee's corrective measures and to the rehabilitative steps which it had taken to improve the station's performance when deficiencies were discovered. Further, the Commission completely refused to consider *at all* the programming performance of the station, even though Station WNJR proffered numerous examples of what it believed to be its outstanding record of public service in mitigation of the operational deficiencies upon which the Commission relied to deny the license renewal application.[4]

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[3] *Continental Broadcasting, Inc.* v. *Federal Communications Commission*, 15 FCC 2d 120 (1968).

[4] Prior to its initial Designation Order, the Commission fully reviewed Petitioner's application for renewal of license, which included an extensive programming showing, and found no deficiencies whatsoever with respect to the station's program performance. None of the designated issues related to the station's program offerings, and, indeed, the Commission's Broadcast Bureau

(Footnote four continued on next page)

Petitioner appealed the Commission's decision, urging that (a) the Commission had unjustly discriminated against Petitioner by refusing (without explanation) to give Petitioner credit for its rehabilitative actions, although it traditionally took such matters into consideration in the case of *other* licensees whose proven derelictions were far more serious than any which the Commission had found at WNJR, and (b) that the Commission further unjustly discriminated against Petitioner by utterly failing to consider in mitigation Station WNJR's total program performance, including its public service contributions, a factor which the Commission traditionally considers in the case of derelictions found in other licensees.

The Court of Appeals affirmed the Commission, rejecting Petitioner's main contentions:

> (a) In response to the contention that the Commission unjustly discriminated against Station WNJR, the Court held that the "choice of remedies and sanctions" is an area within which the Commission has broad discretion, and that the Commission is not (citing *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 228 (1946)) bound "to deal

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(Footnote four continued from page five)

raised strenuous objection to including any public service showing in the record at the hearing precisely because the Commission had raised no question concerning the adequacy thereof. (Tr. 3516-17, 3520-22).

After the Commission's decision denying the license, Petitioner requested a Commission Rehearing and proffered numerous examples of its public service efforts and requested that this material be considered by the Commission in mitigation. The Commission refused to do so. See *Continental Broadcasting, Inc.*, 17 FCC 2d 485 (1969).

with all cases at all times as it has dealt with some that seem comparable" (Decision, Appendix A, *infra,* at p. A-7).

(b) With respect to the contention that the Commission failed to consider Station WNJR's program performance, the Court held that (i) the Commission need not consider "public service" rendered by a station where the licensee is disqualified by its attempts to deceive the Commission, and (ii) in any event, Petitioner lant made no offer of evidence until after the Commission had decided the case and, thus, the Commission was justified in concluding that the proffered evidence came too late. (*Id.* at p. 8)

REASONS FOR GRANTING THE WRIT

Petitioner respectfully urges that the Court of Appeals misconstrued the thrust of Petitioner's argument and, in so doing, allowed the Commission to improperly discriminate against Petitioner. The Commission's error in the instant case lay in its failure to meet the requirement which the Court of Appeals itself has recognized,[5] and which has repeatedly been recognized by the decisions of this Court,[6] that the Commission must act "in

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[5] See *Greater Boston Television Corp.* v. *Federal Communications Commission* ____F.2d____, _____, 20 Pike and Fischer Radio Regulation 2d 2052, 2065 (1970).

[6] See *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-74 (1886): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

furtherance of even-handed application of law, rather than impermissible whim, improper influence or misplaced zeal."[7]

The Court below was quite correct, of course, in holding that the choice of "remedies and sanctions" is an area in which the Commission traditionally has been allowed broad discretion. But the issue here is *not* the scope of the Commission's discretion in choosing an appropriate sanction. The issue is, rather, whether the Commission met the requirements of due process and equal protection by applying *uniform* standards of judgment to similarly situated licensees when faced with the task of assessing the appropriate remedy. The Commission's error in the instant case lay in the fact that it applied standards of judgment to Petitioner which it has consistently refused to apply to licensees in similar circumstances in the past and, perhaps more important, *which the Commission still does not apply to licensees even in cases which it is deciding this very day.* Put differently, the Commission cannot at one and the same time refuse to grant a license to A because of a violation of a particular standard of conduct, while at the very same time, and without any change in policy, grant licenses to B, C, and D, where B, C, and D engage in the same conduct as A. "An agency's view of what is in the public interest may change either with or without a change in circumstances," but whether changed or not, an agency must act "in furtherance *of even-handed application of law,* rather than impermissible whim, improper influence, or misplaced zeal." (*Greater Boston, supra,* ____ F.2d ___ , 20 Pike & Fischer Radio Regulation 2d at 2065, emphasis added.) This is the crux of the instant case.

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[7] See note 5, *supra.*

A. The Commission's Refusal to Consider the Licensee's Program Performance is Discriminatory.

The Commission's failure to consider any of Petitioner's programming evidence (and particularly its public service programming) is a flagrant example of the imposition of discriminatory standards. Petitioner filed voluminous program data demonstrating that it had been one of the first radio stations in the country devoted to serving the Negro community, and was one of the first to do so with blacks being hired at all programming levels.[8] Included in the program showing were communications from leading Newark black leaders, including statements from the National Association for the Advancement of Colored People, the New Jersey Commission Against Discrimination in Housing, the Southside High School of Newark, the Newark Senior Citizens Commission, and the Mayor and Deputy Mayor of Newark. The station also proffered a citation of commendation from the City of Newark for "outstanding meritorious service rendered to the Community." letters from the Mayor, businessmen, educators, government workers, the City of Newark Police Department, Board of Education, numerous churches, the YM and YWCA, Montclair State College, and others.

The Commission ignored this showing, stating that it need not consider any programming evidence where a licensee committed "gross misrepresentation and fraud"

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[8] The majority of the employees at Station WNJR are black. Those responsible for the programming are black. Of the air personnel, 9 out of 10 are black, including two supervisors of the announcing staff. Of 7 persons in supervisory positions in the station, 4 are black. The station has black personnel among its executives, salesmen, engineers and office personnel.

(17 FCC 2d at 489). The Court affirmed this judgment, holding that the Commission need not consider the "public service" rendered by a station where the licensee is disqualified because of misrepresentations. (Decision, Appendix A, at p. A-9.)

But in so holding the Court misconstrued the thrust of Petitioner's arguments. Conceding, *arguendo*, that the Commission need not, if it so desires, consider programming evidence of a licensee who has been found to have "misrepresented," nevertheless, it is a denial of due process for the Commission to *in fact* consider such evidence for certain licensees who have been found to have "misrepresented," while arbitrarily *refusing* to consider it for others who have been found to have so acted, *without ever explaining the reason for the inconsistent treatment.* Yet, this is precisely what the Commission has done in the instant case. There is no doubt that the Commission *traditionally* considers programming evidence as an element in determining the appropriate sanction to be imposed upon a licensee, even where "misrepresentations" have been proven, *and indeed it did so in the very case cited by the Court* (Decision, Appendix A, *infra*, at p. A-9).[9]

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[9] *Immaculate Conception Church of Los Angeles* v. *FCC*, 116 U.S. App. D.C. 73, 320 F.2d 795, *cert. denied*, 375 U.S. 904 (1963). In *Immaculate Conception Church*, the Hearing Examiner and the Commission did, in fact, consider evidence of programming presented by the licensee during the renewal period in weighing the sanction to be applied even though misrepresentations had been proven. The programming which it refused to take into consideration was that presented "while disposition of the KRLA renewal application was still in doubt," simply because such programming did not "provide any assurance that deceptive evidence would not subsequently be resumed by KRLA." See *Eleven Ten Broadcasting Corp.*, 33 FCC 92 at 97. The Commission in the instant case, however, refused even to consider appellant's programming record which was compiled *before* any doubt was raised as to its renewal.

For example:

1. In *Hall* v. *Federal Communications Commission,*[10] the licensee affirmatively and willfully misrepresented critical facts to the Commission. But the Court of Appeals indicated that the misrepresentation alone would *not* be sufficient grounds for disqualification. On the contrary, it was merely one facet which must be considered together with other aspects of the station's past record, *including its programming performance.*

2. In *Westinghouse Broadcasting Company,*[11] the Commission considered whether to renew Westinghouse's broadcast licenses after Westinghouse had been convicted of criminal price fixing and bid rigging. Westinghouse's misconduct in these areas had been so improper that the prosecuting Attorney General characterized it as involving "as serious instances of bid rigging and price fixing as have been charged in the more than half century of the Sherman Act." The Commission, however, in determining the effect of these admitted transgressions, placed great stress upon the record of broadcast performance which Westinghouse had compiled. The Commission weighed Westinghouse's serious transgressions in balance with the Company's programming contributions. It granted the renewals "because

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[10] 103 U.S. App. D.C. 248, 257 F.2d 626, 629 (1958).

[11] 22 Pike and Fischer Radio Regulation 1023 (1962).

of the outstanding nature of Westinghouse's contribution to the public interest in broadcasting" (22 Pike and Fischer Radio Regulation at 1029).

3. In *General Electric Co.*, 2 Pike and Fischer Radio Regulation 2d 1038 (1964), General Electric had been a co-conspirator with Westinghouse in the above described violations. Here again, however, the Commission considered as a criterion of judgment the nature of the Company's program contributions. The Commission actively reviewed the station's programming, found it to be "balanced," and characterized it as reflecting "cooperation with local civic and charitable organizations" (*Id.* at 1042). It found General Electric's record "constitutes clear evidence militating in favor of renewal of license; in this connection, we have also taken into account the great length of the General Electric broadcast record." (*Id.* at 1043). The Commission explained its rationale (*Id.* at 1044, emphasis added):

> We are confronted here, as we were with the Westinghouse renewals, by conflicting considerations—a most serious reflection on the applicant on the one hand *counterbalanced by a long history of broadcast service in the public interest on the other.*

4. In *The Northern Corporation*, 15 FCC 60, 5 RR 673 (1950) the Commission found that the licensee had filed erroneous ownership information. Recognizing that

the filing of accurate information is an essential element of licensee responsibility, the Commission nevertheless renewed the license after considering the licensee's entire record, noting that the station had furnished "a meritorious service to the Boston area and has become quite strongly imbedded in the community life in the area which it serves" (15 FCC at 82, 5 RR at 693). Ironically, the Commission in *The Northern Corporation* stressed precisely the type of integration into the community life which Petitioner unsuccessfully attempted to have the Commission consider in the instant case.

5. In *Ralph J. Silkwood* FCC 69 R-310, the Commission's Review Board underscored the Commission's long standing practice of considering programming evidence in mitigation: (emphasis added):

> The Commission has, in the past permitted the adduction of evidence as to past program record of licensees in renewal proceedings involving character qualification issues. *Such evidence is allowed on the theory that a meritorious program record may mitigate the significance of adverse findings under those issues.*

The above instances represent merely a few of the examples in which the Commission has followed its traditional policy of considering programming evidence in determining culpability. These cases, of course, were

decided prior to the Commission's decision in the instant case. But any notion that the Commission's decision here represented a change in policy is quickly dispelled by the fact that the Commission has continued to apply its traditional policy of weighing programming evidence in the balance, *even after its decision in the instant case.* Thus, in *Trans-America Broadcasting Corporation,*[12] the Commission was faced with a factual situation almost identical to that presented here. The licensee was found to have failed to timely file time brokerage contracts, failed to maintain control over the station's foreign language programming, and, most pertinently, to have deliberately attempted to conceal information from the Commission. Yet, the Commission's Hearing Examiner did not refuse to renew the license. He granted a 1-year renewal as an appropriate period in which to test the licensee's diligence. Most ironically, he did so solely on the grounds that the licensee's programming performance dictated this course of action.[13] In short, the Commission applied precisely the standards of judgment to the Trans-America licensee, and to the other licensees referred to above, which it inexplicably refused to apply to Petitioner.[14]

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12 20 Pike and Fischer Radio Regulation 2d 1095 (1970).

13 The Examiner stated that "it cannot be denied that its [the licensee's] program content, while it is to some extent conventionally commercial, does serve a variety of specialized groups whose needs are not ordinarily met. It would be good to continue KTYM and KTYM-FM if there could be assurance that the licensee would operate in compliance with the Commission's Rules, particularly in the area of control of foreign language programming and the keeping of logs." 20 Pike and Fischer Radio Regulation 2d at 1110.

14 In commenting on this point, the Court of Appeals held that Petitioner's proffer of programming evidence could be ignored because it "came too late," a position which the Commission had

(Footnote 14 continued on next page)

B. The Commission's Refusal to Consider the Licensee's Corrective Measures is Discriminatory.

The Commission's failure to give any weight to Petitioner's corrective action and rehabilitative conduct is an equally flagrant example of the use of discriminatory standards. The record was replete with uncontradicted evidence that Petitioner was at all times concerned that the Commission's Rules and Regulations were met, and took numerous affirmative steps by way of instituting control devices to attempt to insure compliance with its licensee responsibilities. Petitioner instituted extensive monitoring and audit procedures to check the operation of its facility and, immediately upon discovering any violations of Commission or station policy, moved to eradicate them.[15] With respect to the particular program

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urged in argument before it. Such a holding, however, makes a travesty of equitable procedure. As pointed out above, see Note 4 *supra,* Petitioner's application for renewal of license contained a full and complete programming showing. The Commission, after reviewing Petitioner's application, determined that its programming performance was satisfactory and designated no issue concerning the quality of that performance. Indeed, the Commission's Counsel bitterly objected to any attempt to introduce programming evidence into the record. (Tr. 3516-17, 3520-22). Thus, the reason for the absence of program evidence lay not in Petitioner's failure to proffer it in timely fashion, but rather because the Commission initially found that performance to be satisfactory. The Commission's error was that, unbeknownst to Petitioner, and directly contrary to the precedents cited above, the Commission thereafter refused to place in the balance the fact that it initally found the station's program performance to be satisfactory.

[15] Indeed, the Examiner pointed out that the licensee was "unceasing in his efforts to correct these discrepencies" despite employee resentment of the licensee's "unremitting criticism." (See Continental Broadcasting, Inc., 15 FCC 2d 236, 242).

on which most of these discrepancies were found ("Celebrity Time"), the undisputed record reveals that as a result of a personal audit by Petitioner's home office, Petitioner's principals became aware of these deficiences and immediately demanded that they be eradicated, and most were.

Finally, when Petitioner's principals became aware that their station manager had lied not only to them but to the Commission as well, Petitioner immediately made complete disclosure of all of the facts to the Commission and fully cooperated with the Commission, turning over, without being requested to do so, its extensive monitoring data and internal correspondence.[16]

None of these demonstrated rehabilitative achievements was given any credence or weight by the Commission. As far as the Commission's decision in this case is concerned, it was irrelevant that the licensee took rehabilitative steps and constantly attempted to improve its performance. But, the Commission has never before taken such a cavalier and indifferent attitude towards a licensee's rehabilitative and corrective efforts. On the contrary:

1. In *Westinghouse, supra,* the Commission was required to consider whether a broadcast licensee with a demonstrated record of violations of Federal statutes could be relied upon to effectuate its promises and fulfill its responsibilities as a

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[16] Ironically, this monitoring data and correspondence formed the basis of the Commission's case concerning technical deficiencies.

broadcast licensee. In making this determination, the Commission placed substantial weight upon new compliance procedures which Westinghouse had undertaken to avoid a repetion of the antitrust violation. Indeed, Westinghouse's rehabilitative efforts, relied upon by the Commission, stressed greater surveillance and more intensive internal education procedures *in the future*. Similarly, in *General Electric, supra*, the Commission used as a standard of judgment General Electric's *mere promises* to institute a new organizational structure, and future internal education and surveillance. Westinghouse and General Electric did not even demonstrate, as Petitioner did here, a *past* record of improved rehabilitative efforts.

2. In *Lamar Life Broadcasting Company*, 14 FCC 2d 431, 13 RR 2d 769 (1968)[17] the licensee was found to have engaged in blatantly racist programming, insulting the station's Negro audience, and flatly ignoring the needs of Negroes within its service area. Nevertheless, in granting a renewal of license to the station, the Commission placed primary emphasis on the fact that the licensee had begun corrective action and had taken rehabilitative efforts to avoid a recurrence of the incidents.

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[17] Reversed on other grounds, *Office of Communication of the United Church of Christ* v. *Federal Communications Commission*, 138 U.S. App. D.C. 112, 425 F.2d 543, 16 Pike and Fischer Radio Regulation 2d 2095 (1969).

3. The Commission policy with respect to considering rehabilitative efforts was first enunciated almost 30 years ago in *Panama City Broadcasting Co. (WDLP),* 9 FCC 208 (1942), where the record indicated that the licensee had "grossly misled" the Commission, not because the licensee's principal officer was himself purposely deceitful, but because his agents had allowed the Commission to be deceived. The Commission, in refusing to disqualify the *Panama City* licensee, placed primary emphasis upon its rehabilitative conduct. In language which so closely fits the facts in the instant case that it could have been written for it, the Commission pointed out (9 FCC at 218):

> Further evidence of Mr. Perry's good faith may be seen in his conduct from the time he discovered that he had been misled by bad advice and began to discover what improper acts had been committed in his name . . . he voluntarily filed an affidavit with the Commission making a substantial disclosure to the Commission for the first time what the true facts were in the case; and, from the time he learned of the Commission's investigation, he and his counsel and employees in the main cooperated with the Commission's staff in obtaining for the Commission full information

about the history of the application.

Petitioner here carried out the very same rehabilitative conduct as did the licensee in *Panama City*, but the Commission refused even to consider Petitioner's efforts.

Moreover, even after the Commission's decision in the instant case, the Commission has repeatedly used the criterion of rehabilitative conduct to assess the sanction to be applied for licensee irregularities. Thus, in *Howard W. Davis,*[18] the Commission found that the licensee repeatedly violated the Commission's Rules. Moreover, in reponse to numerous official notices of violation, the licensee was evasive in his responses, prompting the Commission conclusion that he was primarily concerned "with obscuring his own procrastination."[19] Yet, both of Davis' operating licenses were renewed, the Commission choosing the lesser sanction of $10,000 forfeiture for each station. More pertinent, the Commission did so precisely in reliance upon Davis' rehabilitive conduct which, the Commission pointed out, belatedly brought Davis' stations into compliance with the Commission's Rules.[20] In sum, the Commission in *Davis* followed its traditional policy of taking into consideration rehabilitative conduct before choosing the appropriate sanction, while it totally ignored Petitioner's rehabilitative conduct in the instant matter. No explanation has ever been forthcoming from the Commission as to why it deserted its traditional standards in the instant case.

The importance of the instant case goes far beyond the loss to the public of a unique and pioneering

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18 27 FCC 2d 102 (1971).

19 27 FCC 2d at 107.

20 27 FCC 2d at 107.

broadcast service which has fulfilled the broadcast needs of the black community in Newark for over 16 years. Nor can its significance be judged merely in the context of a valuable broadcast franchise being ended by the whim or caprice of the Commission. The Commission's action here goes to the heart of the principle of equality which underlies administrative jurisprudence. Although Congress has reposed broad discretionary powers in Federal agencies, nevertheless, the due process and equal protection concepts embodied in the Fifth and Fourteenth Amendments require that these powers be exercised in a fair, equitable and uniform manner. No Federal Commission can be allowed to pick and choose among its standards of judgment, applying certain criteria to large and powerful institutions (such as Westinghouse and General Electric in the cases cited above) and ignoring those very same principles in assessing conduct of other licensees, without ever explaining the reasons for the differences in treatment. If, as we have shown above, the Commission has traditionally used criteria of past program performance and evidence of past rehabilitative conduct in weighing applications of licensees whose operations have been found lacking in certain particulars, the Commission cannot suddenly and without explanation refuse to apply these criteria to Petitioner. To allow them to do so, would be to substitute the chancellor's foot for even-handed justice.

The principle of uniform application of criteria was eloquently stated by the Supreme Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374 (1886):

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to

> their rights, the denial of equal justice is still within the prohibition of the Constitution.

This principle was reemphasized in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942):

> When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . , it has made as invidious a discrimination as if it selected a particular race or nationality for oppressive treatment.

These principles have become familiar in criminal law and civil rights litigation. They apply, of course, as fully to administrative law, and administrative practice, as to the criminal and civil law areas. Although the Court has had few occasions to stress their applicability with respect to Federal administrative agencies, the instant case, Petitioner submits, is an instance wherein the Federal Communications Commission has failed to do its duty of even-handed justice. Petitioner believes that the principle underlying the instant case must be emphatically reaffirmed by this Court so that the public may be assured that the trust which the public has traditionally reposed in administrative agencies is not abused.

Whereas, in view of the above, Petitioner respectfully submits that a *writ of certiorari* should issue.

Respectfully submitted

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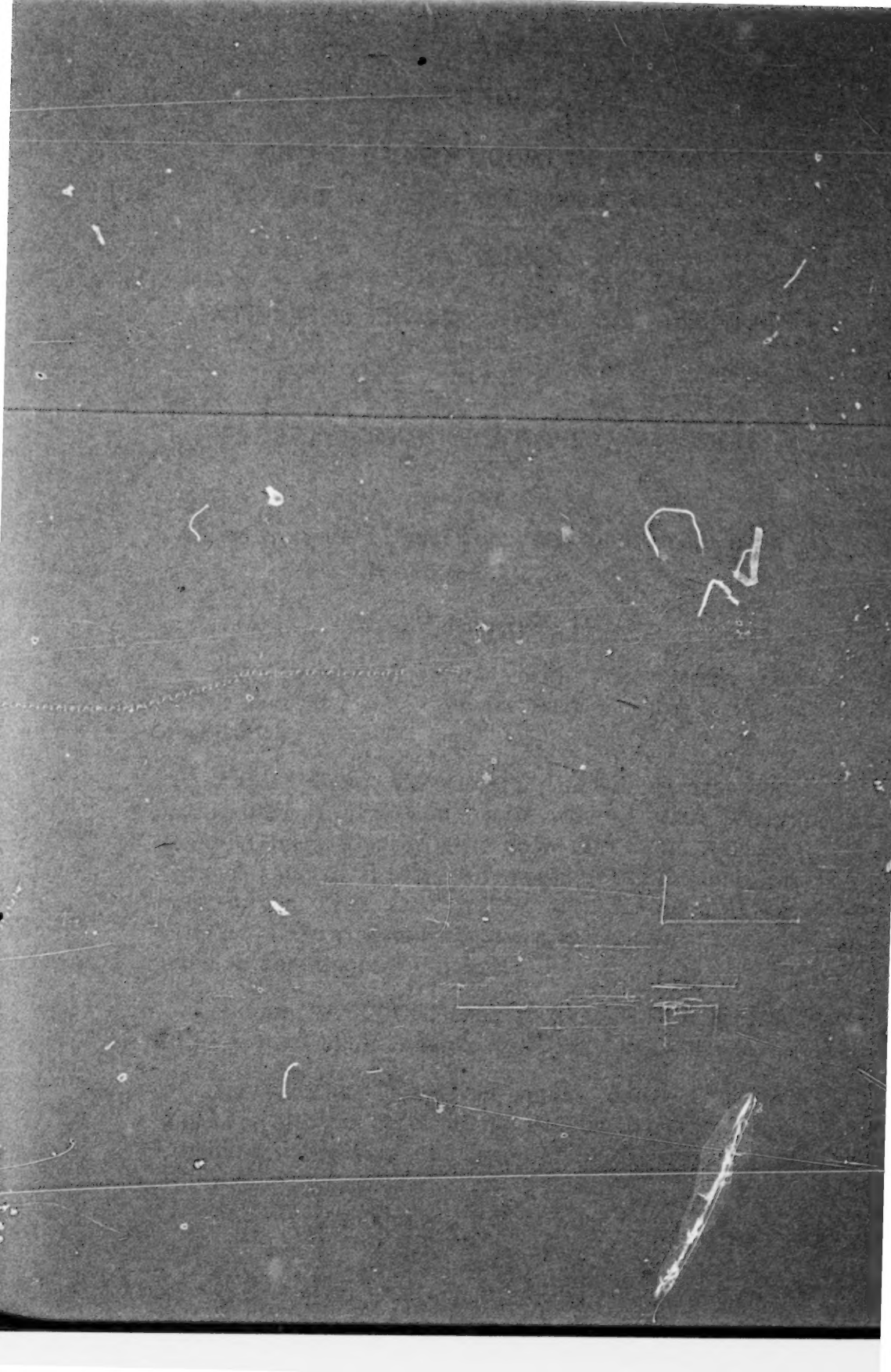
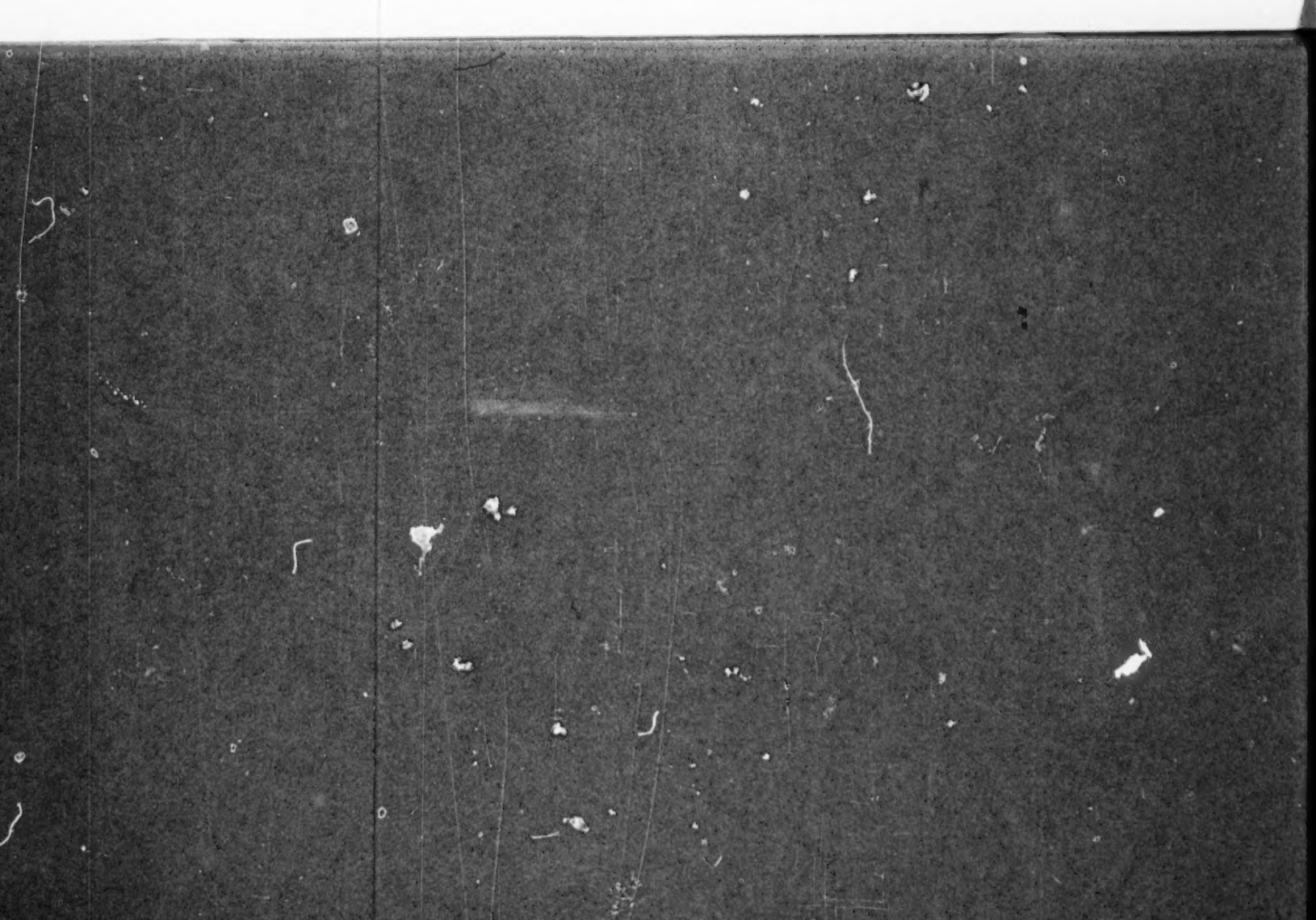
April 19, 1971





APPENDIX A

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 23,099

CONTINENTAL BROADCASTING, INC., APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION

Appeal from the Federal Communications Commission

Decided January 5, 1971

Mr. Leonard H. Marks, with whom *Messrs. Paul Dobin* and *Martin J. Gaynes* were on the brief, for appellant.

Mr. D. Biard MacGuineas, Counsel, Federal Communications Commission, with whom *Messrs. Henry Geller,* General Counsel, and *John H. Conlin,* Associate General Counsel, Federal Communications Commission, were on the brief, for appellee. *Mrs. Lenore G. Ehrig,* Counsel, Federal Communications Commission, also entered an appearance for appellee.

Before: BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and ROBB, *Circuit Judge.*

Per Curiam: This is an appeal, under 47 U.S.C. §402 (b)(2), from orders of the Federal Communications Commission denying the application for renewal of

license of station WNJR, Newark, New Jersey. The license for station WNJR is held by Continental Broadcasting, Inc., a wholly owned subsidiary of Rollins, Inc. The home office of the company is in Wilmington, Delaware. The license was last renewed on February 8, 1961.

In 1963 and 1964 the Commission and its staff investigated the operation of WNJR. The investigation related to alleged derelictions of the station in failing to keep proper program logs and in failing to file with the Commission time brokerage contracts, as required by the Commission rules (47 C.F.R. §§1.613(c), 73.111, 73.112 (1970)). In particular the investigation focused on a program known as "Celebrity Time" which was broadcast over WNJR Monday through Saturday, from 11:00 P.M. to midnight, from the fall of 1957 until March 1963. On this program "rock and roll" records were played, interspersed with spot advertisements and occasional interviews by a "disc jockey" with "guest celebrities". "Celebrity Time" was produced by an independent advertising agency known as Celebrity Consultants.

Following its investigation the Commission on June 10, 1965 designated WNJR's renewal application for evidentiary hearing on the following issues:

> "1. To determine whether in its written response to the Commission's notice of apparent liability or in its oral statements to the Commission's staff the applicant misrepresented facts to the Commission and/or was lacking in candor;*

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*A notice of apparent liability for forfeiture in the amount of $1,000, based on allegation of failure to file copies of a time brokerage contract with the Commission within 30 days of execu-

(Footnote continued on next page)

"2. To determine whether the applicant falsely represented to the Commission or its staff that the 139 'contracts' submitted to the Commission's staff during the course of an investigation of WNJR were, in fact, the actual documents which the applicant allegedly required Celebrity Consultants to file with WNJR on behalf of each sponsor who advertised during 'Celebrity Time'; or whether such 'contracts' were falsified in order to conceal or misrepresent the actual facts with respect to the relationship which existed during the period of the latest renewal and up to the present, between the applicant, its employees and Celebrity Consultants.

"3. To determine whether the principals of the applicant have exercised adequate control of supervision over the operation of WNJR in a manner consistent with the applicant's responsibility during the period of the applicant's most recent license renewal [on February 8, 1961] and up to the present; [footnote omitted]

"4. To determine whether the applicant operated its station contrary to and/or inconsistent with the provisions of section 317(a)(1) and (c) of the Communications Act and sections 73.111, 73.112, and 73.119 of the

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(Footnote continued from page A-2)

tion thereof in violation of sec. 1.613(c) of the rules, was transmitted to the licensee of station WNJR on Jan. 22, 1964. The licensee filed a response and opposition to the notice on Mar. 16, 1964. By a letter dated June 24, 1964, Continental withdrew its response and opposition and also submitted a check in full payment of the forfeiture.

Commission's rules [pertaining to sponsorship identification and maintenance of program logs];

"5. To determine whether the applicant failed to file certain agreements regarding the sale of time periods to time brokers in violation of section 1.613(c) of the Commission's rules;

"6. To determine whether, in light of the evidence adduced under the foregoing issues, the applicant has reflected the necessary qualifications to continue to be the licensee of station WNJR;

"7. To determine whether a grant of the above-captioned application would serve the public interest, convenience, and necessity."

After lengthy hearings reported in somewhat over 6800 pages of transcript the examiner filed his initial decision. The decision occupies 113 pages in the printed record; 83 pages are devoted to detailed findings of fact. The examiner found and concluded that (1) during the investigation of WNJR by the Commission's staff the station manager had submitted to the staff 139 spurious documents which he represented to be genuine contracts for advertising on the Celebrity Time program; (2) these documents had been prepared at the direction of the manager in order to conceal facts material to the investigation; (3) over a period of many months WNJR had failed to maintain proper and accurate program logs and the licensee had been aware of this failure; (4) the licensee had failed to file time brokerage contracts with the Commission, in violation of the Commission's rules; and (5) the licensee's principals had failed to exercise adequate control or supervision over the station in a manner consistent with the licensee's responsibility.

Summarizing his findings the examiner referred to station WNJR as an "Augean stable".

The examiner found, however, that the principal officers of the licensee had not been guilty of knowing participation in the misrepresentations and misconduct of their station manager, that they had manifested an interest in and concern for the proper conduct of the station's affairs, and that they had "tardily acted to clear the Augean stable". Accordingly, the examiner recommended that the station's license be renewed for a one-year "probationary" period rather than the normal three-year term.

Continental filed no exception to the examiner's findings and conclusions. The Commission's broadcast bureau did file exceptions, urging that the application for renewal be denied.

After oral argument the Commission in its decision adopted the conclusions of the hearing examiner with respect to the misconduct and fraudulent acts of the station manager. The Commission concluded further "that the manager's gross misconduct and fraud on the Commission must be imputed to the licensee because of its failure to exercise adequate control and supervision over the management and operation of WNJR consistent with its responsibilities as a licensee." (15 F.C.C.2d at 123). Finally the Commission concluded:

> "The facts as found in this case are irreconcilable with a public interest finding. We have carefully examined the entire record in this proceeding, and we are unable to find any mitigating circumstances which would justify a grant of a renewal of license even for a period of 1 year. While nonrenewal of the license is a severe sanction, we have reached this decision

> only after a through consideration of the entire fact situation. See *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946)."

15 F.C.C.2d at 131.

The application for renewal of license was denied.

Continental filed a petition for reconsideration of the Commission's decision, requesting (1) that the Commission adopt the recommendation of the hearing examiner that the license be renewed for one year, or in the alternative (2) that the record be reopened to consider information bearing on the performance of station WNJR. The petition was denied.[1]

Since the examiner's findings of misconduct and fraud, which were adopted by the Commission, are not challenged by Continental, it is unnecessary to trace the threads of the tangled web of facts and circumstances which the examiner described in his decision. Given these findings our only task is "to see whether the Commission's judgment, based on the record as a whole, is reasonable and within its proper discretion." *Kidd* v. *F.C.C.*, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962). *See also Lorain Journal Company* v. *F.C.C.*, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966); *KWK Radio, Inc.* v. *F.C.C.*, 119 U.S. App. D.C. 144, 337 F.3d 540 (1964), *cert. denied*, 380 U.S. 910 (1965). As the Supreme Court put it in *F.C.C.* v. *WOKO, Inc.*, 329 U.S. 223, 229 (1946), "* * * it is the Commission, not the courts, which must be satisfied

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[1] See the Examiner Initial Decision, 15 F.C.C.2d 133-246 (1967); the Commission's Decision, 15 F.C.C.2d 120-132 (1968); the Commission's Memorandum Opinion and order denying petition for reconsideration and rehearing, 17 F.C.C. 2d 485-490 (1969).

that the public interest will be served by renewing a license. And the fact that we might not have made the same determination on the same facts does not warrant a substitution of judicial for administrative discretion since Congress has confided the problem to the latter." Viewing the record in this light we think the Commission acted reasonably and within its discretion in finding that renewal of Continental's license would not be in the public interest.

Continental attacks the Commission's decision on several grounds. First, it argues that the Commission acted arbitrarily by imposing the "ultimate sanction" of refusal to renew the license. We are told that in comparable cases the Commission has applied milder sanctions by way of fines or short-term licenses; and it follows, says Continental, that the Commission in this case has abused its discretion by ignoring its own standards. We have made it plain in the past, however, that "the choice of remedies and sanctions is a matter wherein the Commission has broad discretion." *Lorain Journal Company* v. *F.C.C.*, 122 U.S. App. D.C. 127, 134, 351 F.2d 824, 831 (1965), *cert. denied*, 383 U.S. 967 (1966). Here the Commission has exercised its discretion on the basis of undisputed facts. As the Supreme Court said in the *WOKO* case, 329 U.S. 223, 228 (1946), "we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

In support of its contention that the Commission has arbitrarily invoked against station WNJR a standard different from that applied to other licensees, Continental cites *Melody Music Inc.* v. *F.C.C.*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965). In that case the Commission considered two renewal applications at virtually the same time. In each case the Commission found that there had been misconduct in broadcasting a deceptive television

quiz program; yet one applicant was held disqualified and the other was not. We order the Commission to explain its reasons for distinguishing between the two applicants. We think that on its facts the *Melody Music* case is not in point here, for here there is no close parallel or relationship between the facts and the issues presented and any other case. On the other hand, denial of an application for renewal of a broadcast license because of misrepresentation to the Commission is by no means a novel sanction. *See., e.g., F.C.C.* v. *WOKO*, 329 U.S. 223 (1946); *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 116 U.S. App. D.C. 73, 320 F.2d 795, *cert. denied,* 375 U.S. 904 (1963); *KWK Radio, Inc.* v. *F.C.C.*, 119 U.S. App. D.C. 144, 337 F.2d 540 (1964), *cert. denied,* 380 U.S. 910 (1965); *Lorain Journal Company* v. *F.C.C.*, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965), *cert. denied*, 383 U.S. 967 (1966).

Continental argues further that the Commission erred by failing to give adequate weight to the licensee's "corrective measures" and "rehabilitative steps to correct deficiencies in the operation of station WNJR, when those deficiencies were discovered." The record discloses, however, that the Commission did carefully consider the examiner's finding (15 F.C.C.2d at 234-236) that the licensee had instituted a number of control procedures for its stations. (See Commission Decision, 15 F.C.C.2d at 126, 127; Commission's Memorandum Opinion and Order, 17 F.C.C.2d at 486, 487). The Commission in its decision pointed out that the examiner had concluded, and Continental had taken no exception to his conclusion, that the licensee did not exercise adequate control or supervision over the operation of station WNJR in a manner consistent with its licensee responsibilities. The Comission thought that such a lack of supervision and control demonstrated intolerable irresponsibility. We cannot say that the Commission's conclusion is without rational support in the record.

Finally, Continental argues that in weighing the qualifications of station WNJR the Commission improperly failed to consider the station's program performance. A short answer to this contention is that the Commission "need not consider the public service rendered by a station where the licensee is disqualified by its attempts to deceive the Commission." *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 116 U.S. App. D.C. 73, 75, 320 F.2d 795, 797, *cert. denied*, 375 U.S. 904 (1963). Moreover, the record discloses that Continental made no offer of evidence of programming until after the Commission had decided the case; on the contrary, in response to a question from the examiner, counsel for WNJR stated that he did not intend to make any "program showing" by way of mitigation, that the "question of actual programming was not in issue." See 17 F.C.C.2d at 488. The matter of programming was raised for the first time when Continental moved to reopen the record after the Commission's decision. The Commission was justified in concluding that the proffer of evidence came too late. *See Colorado Radio Corp.* v. *F.C.C.*, 73 U.S. App. D.C. 225, 118 F.2d 24 (1941).

The decision of the Commission is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,099 September Term, 1970.

Continental Broadcasting, Inc.,
Appellant Filed Jan 5, 1971

v.

Federal Communications Commission

Appeal from the Federal Communications Commission

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Robb, Circuit Judge.

JUDGMENT

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the decision of the Federal Communications Commission appealed from herein is hereby affirmed.

Per Curiam
For the Court:

Nathan J. Paulson
Clerk

Dated: January 5, 1971

Opinion per curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 23,099 September Term, 1970

Continental Broadcasting, Inc.,
Appellant

v. Filed Feb 10, 1971

Federal Communications Commission

Before: Bazelon, Chief Judge; Wilbur K. Miller, Senior Circuit Judge and Robb, Circuit Judge.

ORDER

On consideration of appellant's petition for rehearing, it is

ORDERED by the Court that appellant's aforesaid petition is denied.

Per Curiam

For the Court:

/s/ N. J. Paulson
NATHAN J. PAULSON
Clerk

APPENDIX D

The Constitution

AMENDMENT V

No person shall *** be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1597

CONTINENTAL BROADCASTING, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–9) is not yet officially reported. The decision of the Federal Communications Commission (Pet. Supp. App. I, 1–24) is reported at 15 F.C.C. 2d 120–132, and the Commission's memorandum opinion and order denying reconsideration and rehearing (Pet. Supp. App. II, 1–10) is reported at 17 F.C.C. 2d 485–490. The hearing examiner's initial decision, not reprinted by petitioner, is reported at 15 F.C.C. 2d 133–246.

425-365—71

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on January 5, 1971, and rehearing was denied (Pet. App. C) on February 10, 1971. The petition for a writ of certiorari was filed on April 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission's refusal to renew petitioner's radio station licenses for a one-year probationary period because of misconduct and misrepresentations made possible by petitioner's failure to exercise adequate control and supervision over the station, was unreasonably discriminatory.

STATUTES INVOLVED

Sections 308(a) and 309(a) of the Federal Communications Act, 48 Stat. 1084, 1085, as amended, 47 U.S.C. 308(a), 309(a), provide in pertinent part:

> § 308(a) The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it * * *.
>
> § 309(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of

such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

STATEMENT

In 1963 and 1964 the Federal Communications Commission investigated the operations of WNJR, a radio station in Newark, New Jersey, licensed to petitioner (Pet. App. A–2),[1] to determine whether the licensee had properly kept program logs and had filed time brokerage contracts with the Commission, particularly in regard to a program called "Celebrity Time" (Pet. Supp. App. I, 4–7). Petitioner meanwhile had applied for renewal of its license. The Commission, as a result of its investigation, designated this application for hearing and specified a series of issues to determine whether petitioner possessed the necessary qualifications to retain the license; whether it had misrepresented facts or was lacking in candor; whether it had properly identified sponsors, properly kept program logs and filed time brokerage contracts with the Commission as required by Commission regulations; and whether the principals of petitioner had exercised adequate supervision of WNJR's operations (Pet. App. A–2–4).[2]

---

[1] Petitioner Continental is a wholly-owned subsidiary of Rollins, Inc., which in turn has control of seven AM, three TV and two FM stations (Pet. Supp. App. I, n. 1).

[2] The Commission did not set as an issue the licensee's programming performance, and the parties did not offer evidence on that issue to the examiner (Pet. App. A–9).

After a lengthy hearing the examiner found that during the investigation, WNJR's general manager had failed to disclose relevant documents, had made false statements and had supplied false documents to the Commission concerning advertising contracts for "Celebrity Time." He further found that the station failed to file time brokerage contracts for that program and to keep accurate program logs. This misconduct, the examiner found, was calculated to conceal the actual facts concerning the station's practices in connection with the program. The examiner finally found that the licensee did not exercise adequate control or supervision over the operation of the station (Pet. Supp. App. I, 4–7). He concluded, however, that petitioner's license should be renewed for a one-year probationary period.

On exceptions by the Commission's Broadcast Bureau, the Commission reversed the examiner and denied the application for renewal (Pet. Supp. App. I, 1–23). Petitioner did not challenge the examiner's extensive findings of fact. After carefully considering those findings, the Commission concluded that even a minimal degree of responsible supervision by WNJR's principals could have prevented the gross misconduct and fraud on the Commission in which the station manager had engaged and that, in the circumstances of this case, the licensee must be held responsible for its conduct (Pet. Supp. App. I, 7, 17). It therefore concluded "that the applicant has not reflected the necessary qualifications to continue to be the licensee of WNJR," (Pet. Supp. App. I, 4) and that renewal would not serve the public interest.

In denying petitioner's request for reconsideration and rehearing (Pet. Supp. App. II, 1–10), the Commission also denied petitioner's request that the record be reopened so that evidence could be offered about WNJR's past programming performance. It pointed out that WNJR had not sought to introduce programming evidence during the hearing; on the contrary, "when asked about the matter by the examiner, counsel for WNJR stated that he did not intend to make any overall program showing by way of mitigation * * * and further stated that 'The question of actual programming was not in issue' " (Pet. Supp. App. II, 7). In any event, evidence of public service programming would not have been decisive in the Commission's view because of the "gross misrepresentation and fraud practiced on the Commission by the licensee" (Pet. Supp. App. II, 8).

The Commission also distinguished several of its recent actions, which petitioner claimed demonstrated "a disparity in the treatment of WNJR and other licensees" (*id.*).

On petitioner's appeal, the court of appeals concluded that in the light of the findings of misconduct and fraud, "the Commission acted reasonably and within its discretion in finding that renewal of Continental's license would not be in the public interest" (Pet. App. A, 6–7). The court also ruled that there was no merit to petitioner's claim of discriminatory treatment (*id.* at 7–8); that there was rational support in the record for the Commission's rejection of the licensee's tardy corrective measures (*id.* at 8);

and that the Commission was justified in concluding that the proffer of programming evidence came too late (*id.* at 9).

ARGUMENT

The Commission's action, unanimously affirmed by the court of appeals, is correct and presents no issue warranting plenary consideration by this Court.

Petitioner's contentions that the Commission unfairly discriminated against it by refusing a probationary renewal (Pet. 9, 15) are without merit. It is well-established that whether an applicant is fit to receive a license is a matter for "* * * the Commission, not the courts, which must be satisfied that the public interest will be served by [granting] the license." *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229. And the Commission is not bound "* * * to deal with all cases at all times as it has dealt with some that seem comparable." *Id.* at 228. The determination whether an applicant is fit to receive a renewal of its license must necessarily turn on the facts of each particular case. As both the Commission and the court of appeals recognized, the facts of this case are significantly different from the facts of the cases upon which petitioner relies. The degree of fraud and misconduct here justified the Commission's exercise of its discretion to refuse to grant a one-year period of probation.[3]

[3] As in the court of appeals (Pet. App. A–6), there is no dispute between the parties here concerning the findings of misconduct. The issue is only the degree to which petitioner is to be held responsible for the misconduct of the station manager.

The Commission's refusal, upon the petition for reconsideration, to reopen the record to appraise the licensee's program performance was entirely reasonable. Where the licensee is disqualified because of fraud, the Commission need not consider past programming at all. *Immaculate Conception Church of Los Angeles* v. *F.C.C.*, 320 F. 2d 795, 797 (C.A.D.C.), certiorari denied, 375 U.S. 904.[4] Moreover, petitioner had declined to present evidence of programming in mitigation of its misconduct during the hearing and raised the matter only after the Commission had rendered its decision (Pet. App. A–9). At that late stage, the Commission was justified in refusing to reopen the record.

Petitioner's argument that the Commission discriminatorily refused "to consider the licensee's corrective measures * * * " (Pet. 15) is also without merit. The Commission in fact carefully considered petitioner's efforts at corrective action (Pet. Supp. App. I, 12–14; Pet. Supp. App. II, 3–4), which the hearing examiner had set forth at some length.[5] But the Commission, as well as the hearing examiner, concluded that, not-

[4] The cases cited by petitioner (Pet. 11–13) are not in point, for they do not reveal misconduct connected with broadcasting as gross or as extensive as that of petitioner. In two of these cases, *Westinghouse Broadcasting Company*, 22 R.R. 1023, and *General Electric Co.*, 2 R.R. 2d 1038, the misconduct occurred not in broadcasting but in the distinct and separate fixing of prices of heavy electrical equipment. In *Hall* v. *Federal Communications Commission*, 257 F. 2d 626 (C.A.D.C.), the Commission had determined that the misrepresentation was not wilful, *The Spartan Radiocasting Co.*, 23 F.C.C. 106, 112; the same is true of *The Northern Corporation*, 15 F.C.C. 60, 83.

[5] *Continental Broadcasting, Inc.*, 15 F.C.C. 2d 133, 234–236.

withstanding these efforts, the petitioner had seriously failed to exercise the degree of responsible supervision over station operations which may be expected of a licensee (Pet. Supp. App. I, 17; Pet. Supp. App. II, 3–4). The evaluation of such matters is peculiarly a task for the Commission, and, as the court of appeals stated, the Commission's judgment that the "lack of supervision and control demonstrated intolerable irresponsibility" (Pet. App. A 8) was reasonable and should not be disturbed on review. See *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 229.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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